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CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

O.A. No. 954 of 1988

5th day of November, 1993

1. Hon'ble Mr. J.P. Sharma, Member (J)
2. Hon'ble Mr. B.K. Singh, Member (A)

Krishna Kant  
Special Director,  
Enforcement Directorate (FERA)  
Lok Nayak Bhavan,  
6th Floor, Khan Market,  
New Delhi.

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Applicant

By Advocate: Shri Madhav Panicker.

Versus

1. Union of India, through  
Secretary,  
Ministry of Finance  
Department of Revenue,  
New Delhi.
2. The Central Board of Excise & Customs  
through its Chairman,  
North Block,  
New Delhi.
3. The Chairman,  
U P S C  
New Delhi
4. Shri M.C. Kaul,  
Addl. Collector of Central Excise,  
Baroda (Gujarat)
5. R.G. Raju,  
Dy. Director, O.M. Directorate,  
Customs & Central Excise,  
Rajendra Place, New Delhi.
6. Shri Virendra Singh,  
Dy. Collector, Customs,  
New Customs House, Bombay.
7. Shri Dalbir Singh,  
Dy. Director,  
Central Narcotics Central Bureau,  
Ranjit Hotel, New Delhi.
8. Shri V.K. Asthana,  
Addl. Collector, Customs,  
New Customs House, Bombay.
9. Shri A.K. Mehta,  
Dy. Collector,  
Central Excise, Guntur (A.P.)



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10. Shri P.R. Venkataramanan  
Regional Director of Training,  
Central Excise & Customs,  
Kilpauk, Madras.
11. Shri J.N. Nigam,  
Sr. Departmental Representative,  
Customs, Excise & Gold (Control)  
Appellate Tribunal, RK Puram, New Delhi.
12. Shri S.K. Bhardwaj,  
Collector of Central Excise (Appeals)  
New Central Excise Building,  
Church Gate, Bombay.
13. Shri B.K. Mishra,  
Dy. Director,  
Narcotics, Central Bureau,  
Ranjit Hotel, New Delhi. .... Respondents.

By Advocate: Shri P.P. Khurana.

ORDER

Hon'ble Mr. B.K. Singh, Member (A)

Heard the learned counsels, Shri Madhav Panicker for the applicant and Shri P.P. Khurana for the respondents and perused the record of the case and the ACRs of the applicant submitted by the learned counsel for the respondents.

2. This O.A. No.594/88, Shri Krishna Kant as applicant Vs. Union of India & others as respondents, has been filed against the order No. F.A.23020/10/87-Ad.II dated 15.6.1987 rejecting the representation of the applicant regarding his supersession as Deputy Collector, Customs and Central Excise. This is annexure-1 of the paper-book.



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3. The applicant was appointed to the Indian Customs and Central Excise Service on 12.12.1967 on the result of IAS and Allied Services Examination held in 1966. He worked as Superintendent Class I and then became Assistant Collector of Central Excise in Mysore in 1971 and continued to hold that post till 1975. He joined as Under Secretary in the Ministry of Finance, Department of Revenue, New Delhi in the later part of 1975 and continued to hold that post till 1977 when he was posted as Joint Director Department of Economic Affairs, Ministry of Finance New Delhi.


4. As per the seniority list dated 11.5.1976 (annexure 3) the applicant was placed at Sl. No.54 of the said list. By an order No. 1/78 dated 2.1.78 (annexure 4) officers in the grade of Assistant Collector of Customs & Central Excise were promoted and appointed to officiate in the grade of Deputy Collector of Customs & Central Excise. In the said order, the applicant did not find place. His juniors in the seniority list dated 11.5.77 were placed at Sl. No. 2 to 11. The officers at Sl. Nos. 12 to 15 of the said list dated 2.1.78 belonged to reserved category. By a subsequent order issued in March 1978, Shri R.H. Raju, another officer junior to the applicant was also promoted as Dy. Collector and placed between Sl. No. 2 and 3 in the list of 2.1.78. There is an averment in the O.A. that no adverse remarks were ever

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communicated to the applicant and this being so he filed a representation in March 1978 which was rejected in June 1978. Being aggrieved by the rejection of the representation, the applicant made a further representation in November 1981 enclosing Order No. 22011/3176-Estt.(D) dated 24.12.80 issued by the Department of Personnel in the matter of filling up of the post by selection. This circular envisaged that DPC should be held each year and a fall in standard should be communicated.

5. Reliefs sought are: quashing the order dated 15.6.79 (annexure 1), declaring that 1976-77 remarks should not be taken into consideration while deciding the promotion of the applicant to the post of Deputy Collector in 1977 and to grant consequential benefits. The applicant admits that he was given ad-hoc promotion as Dy. Collector w.e.f. April 1983 vide order No. 32012/4/83-Ad.II dated 20.4.1983 and vide order No. 74/85 dated 7.6.85 he has been regularly promoted to the post of Deputy Collector.

6. The learned counsel for the applicant based his arguments on the O.M. No. 22011/3176/Estt.(D) dated 24th December 1980 of the Ministry of Personnel regarding holding<sup>of</sup> regular DPCs so that juniors with a more brilliant record of service do not get a chance to supersede seniors with relatively less brilliant record of service and that the categorisation as 'above average' in the grading should mean 'good'. And that the Hon'ble High Court of



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Gujarat in F.J. Fernandes Vs. Union of India had held that the case of the petitioner should be re-examined excluding the reports in question. The main grievance of the petitioner in that case was that when there is a fall in standard of the officer's performance from 'very good' to 'good', though not adverse, must be communicated to the officer concerned because it has an adverse effect on his future prospects in accordance with the instructions contained in the O.M. No. 51/3/66-Estt(A) dated 2.3.68. The learned counsel argued that the Hon'ble Supreme Court had, in Union of India Vs. F.J. Fernandes (SLP Civil No. 14514 of 1983 - annexure A-5) dismissed the SLP filed by the Government of India against the order passed by the Hon'ble High Court of Gujarat in F.J. Fernandes Vs. Union of India (Special Civil Application No. 3545 of 1979 - Annexure-6) and as such the dismissal of SLP by hon'ble Supreme Court should be deemed to have confirmed the verdict of the hon'ble High Court of Gujarat and thus it should be treated as obiter dicta. He also stressed the need of perusing the ACRs of the officer.

7. The learned counsel for the respondents argued that this O.A. is not maintainable since the cause of action arose three years before the constitution of the Tribunal and as such the Tribunal has no jurisdiction over this matter. It was further argued that the Ministry of Finance rejected the representation vide Department of Revenue F. No. 23120/10/87-Ad.II dated 15.6.87 after due consideration. It was stated that promotion from the post of Assistant Collector to that



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of Deputy Collector is by selection <sup>on</sup> and merit. His case for promotion came up for consideration in 1975 DPC and in 1977 DPC. He was at Sl. No. 101 in 1975 and since he was classified <sup>neither</sup> as 'outstanding' nor as 'very good', he name was not included in the panel of 34 officers recommended by the 1975 DPC for promotion to the grade of Dy. Collector in 1975. It is admitted by both parties that no DPC was held in 1976. His name came up for consideration in 1977 DPC. On the basis of his ACRs he was rated as 'good' only and as such he did not find a place amongst the 45 officers recommended by 1977 DPC. The next DPC was held in August 1978. That DPC assessed him as 'very good' and his name was included in the panel. It was further argued by the learned counsel for the respondents that instructions contained in O.M. No.51/3/68-Estt.A dated 2.3.68 were cancelled vide Ministry of Home Affairs O.M. No. 21011/3/83-Estt.A dated 30.12.83. He argued that instructions of O.M. No.51/3/68-Estt.A dated 2.3.68 became inoperative after the said O.M. dated 30.12.83. He contended that Department of Personnel & A.R. vide their O.M. No. 22011/6/75-Estt.D dated 30.12.76 gave full liberty to DPCs to evolve its own classification for promotion by selection on merit taking into consideration the grading in ACRs. This circular was in force when DPC met in 1977. This strikes at the very root of the circular issued in 1968 and dispenses with the instructions contained therein. The learned counsel <sup>for respondents</sup> argued that arguments based on the judgments cited by the learned counsel for the applicant <sup>were not relevant to the present issue.</sup> These judgments are

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judgments in personam and <sup>not</sup> judgments in rem. They applied to the parties to which they relate and they do not lay down any ratio or principle to be extended to the applicant. While dismissing the SLP filed against the Gujarat High Court judgment in the case F.J. Fernandes, the Hon'ble Supreme Court did not pronounce any judgment laying down any law. The dismissal only required implementation of judgment so far as parties in the case were concerned. The learned counsel for the respondents cited judgment of Hon'ble Allahabad High Court in the matter of D.K. Tiwari Vs. State of U.P. and another (W.P. 3747/85) which held that reduction in grading from 'very good' given in the CR for the previous year to 'good' for the subsequent year cannot be treated as an adverse entry. A copy of this judgment has also been filed as annexure-IV to the ~~paper~~ counter.

8. We have perused the O.M. of 1968. The administrative instructions contained therein are not mandatory in nature. They are merely directory. It does not create a right to be agitated in a court of law. The question whether instructions contained in an O.M. are mandatory or directory depends on the intent of the rule making authority and <sup>not</sup> upon the language in which it is clothed.

9. The neglect in not following the instructions of 1968 O.M. does not confer any right on the public servant and this cannot afford him a cause of action or entitle him to reliefs claimed. Non-observance of mandatory conditions can be fatal but if the condition is held to be merely directory, its non-observance will not matter.

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This is also precisely the reason why the instructions contained in the O.M. of 1968 were cancelled by the O.M. of December 1983.

10. In any promotion by selection on merit, five years <sup>ACRs</sup> are taken in <sup>to</sup> consideration in Government of India. These relate to the preceding five years ending March of the year in which the DPC meets. A synopsis of the CRs of this officer for these five years is given below. While posted as Superintendent, Class-I, Nagpur, 24.12.71 to 31.3.72, he got the following remarks:-

- "General Intelligence: Very Good
- Judgment & sense of proportion: Very good
- KNOWledge of work : Good
- Industry & conscientiousness: Very good
- Quality & speed of disposal: Good
- Effectiveness in inspection & supervision: Good
- Relations with public : Very good
- Special aptitude : Good in field, especially in investigation.
- Integrity: Nothing adverse came to notice.
- General assessment: An officer who carries himself well and is devoted to his duties. He has good initiative and penetration and accepts responsibility willingly. He has good control over his staff and maintains cordial relations with them. He expresses himself well both on paper and in discussions."

These remarks have been recorded by Shri I. Masserihis, Deputy Collector, Central Excise, Bangalore. The reviewing and counter signing officers have simply endorsed these remarks. He got the following remarks in his CR for the period 1.6.72 to 31.3.74:

- "General Intelligence: Above average.
- Judgment & sense of proportion: Good
- KNOWledge of work : Very good

Industry and conscientiousness : Conscientious and hard-working. Takes pains in work.

Quality & speed of disposal: Quite prompt and efficient. His reports indicate careful study and application of mind.

Effectiveness in inspection & supervision : Very good. His inspections are thorough and effective.

Efforts to reduce arrears: Good

Relation with public: Good

Special aptitude: Shri Krishna Kant is shaping well. He has displayed talents both in secretariat and executive work. He is particularly good at analysis of problems.

Integrity: Nothing adverse came to my notice.

General assessment: Shri Krishna Kant has expressed himself as an intelligent and painstaking efficient officer who goes deep into the problem and makes sincere efforts to solve them. He possesses initiative and a sense of responsibility. He expresses himself very well both on paper as well as during discussions. He has got good control over his staff and is able to make proper use of them. He enjoys their confidence and has been quite fair in judging them. Maintains good health. With some experience he should be fit for accelerated promotion."

These remarks have been recorded by Shri R.B. Sinha, Collector Central Excise, Bangalore. Mr. J. Banerjee, Member, Central Board of Excise and Customs wrote: "I have not seen his work and therefore no comments." He got the following remarks in the CR for the year 1.10.74 to 31.3.75:-

General Intelligence: Very good judgment

Sense of proportion : Good

Knowledge of work: Very good

Industry & Conscientiousness: Conscientious and hardworking

Quality and speed of disposal: Very good

Effectiveness of inspection and supervision: Very good

Efforts to reduce arrears: Good

Relations with public: Good

Special aptitude : Has shown merits both in executive and secretariat type of work, especially in analysis of complicated problems.

Integrity: Nothing adverse has come to my notice.

General assessment: Though short in stature, has a good personality. Intelligent, painstaking and efficient in his work. He tackles

problems thoroughly and endeavours to solve them. Has lot lot of initiative and good sense of responsibility".

These remarks were also recorded by Shri R.B. Sinha, Collector, Central Excise. Mr. Banerjea down-graded him from 'very good' to 'good' only.

For the period 1.9.75 to 31.3.76 he got the following remarks, as Under Secretary, Ministry of Finance:-

Knowledge: Good

Quality of work: Considers all relevant details

Judgment: Quite reliable and takes reasonable view of the matters.

Presentation of cases: Good

General intelligence and keenness: Good. Shri Krishna Kant is a keen and intelligent officer. Has a good grasp of the issues which often rise for consideration in the field of indirect taxes and can analyse their implications both administrative and economic. His relations with staff and fellow-officers have been very good. His services were of great help to Economic Division but unfortunately he has been repatriated".

These remarks were recorded by Shri A. Bagchi, Director Department of Economic Affairs. The reviewing officer has endorsed these remarks. The Chief Economic Advisor has considered him fit for promotion in turn and his rating has been 'excellent'.

11. It would be seen, thus, that the remarks prior to 1977 are of mixed type. Sometimes 'good' and sometimes 'very good'. There is a preponderance of 'good' only. While calling him as an officer 'above average', the reporting officer has categorised his overall assessment as 'very good' and as such he cannot be faulted. There is no question of down-grading 'above average' as 'good' since overall grading even for that year has been 'very good'. Thus the attack by the learned counsel for the



applicant on 'above average' and equating the applicant with 'good' is misplaced since the grading is 'very good. In any promotion by selection on merit a preponderance of good remarks with less of 'outstanding' and 'very good' will entail supersession by junior officers if their comparative remarks for the same period have been consistently 'outstanding' or 'very good'.

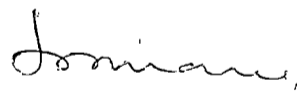
12. Thus we hold <sup>the</sup> view that no case is made out for promotion on the basis of ACRS prior to 1977. We also hold the view that there is no 'adverse remark' and where 'above average' occurs, the grading given is 'very good', and as such the arguments of the learned counsel for the applicant are misdirected. The judgment in the case of F.J. Fernandes Vs. Union of India delivered by Hon'ble Gujarat High Court is not relevant to the issue involved in the present case. The instructions contained in the 1968 O.M. are not mandatory but only directory in nature. There is no adverse remark and there is no fall of standard to be communicated since the 'above average' is negated by grading of the applicant as 'very good'. The entire edifice built on this premise thus gets demolished. The Allahabad High Court judgment in the matter of D.K. Tiwari Vs. State of U.P. is much more relevant to the facts of this case. The DPC which met in 1975 and 1977 have declared the applicant as 'good' only and thus he could not make it to the panel. Even if the DPC was held in 1976, he would not have been in a position to make the grade since all remarks are mixture of 'good' and 'very good' only but the preponderance is of 'good' only.

Thus there is no force in the contention of the learned counsel for the applicant that if the DPC was held in 1976, he would have made it to the panel.

13. The procedure laid down by the Government of India in the preparation of panel has been correctly followed and there has been no injustice done in the case of the applicant. The application is also hopelessly barred by time. It has been held by Hon'ble Supreme Court that repeated representations on the same subject cannot keep a matter live. The applicant filed his first representation in March 1978 which was rejected in June 1978. His representations made in 1981 and 1983 do not add to the period of limitation. As a matter of fact the cause arose in June 1978 itself. A person who sleeps over his rights loses it and, thus, remedy sought has also become hopelessly time barred.

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14. In ~~the~~ the foregoing observations, we dismiss this O.A. on grounds of limitation and also on grounds of merit. There will be no order as to costs.

  
( B.K. Singh )  
Member (A)

  
( J.P. Sharma )  
Member (J) 5.11.93

v p c  
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